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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 589

WILLIAM JACOB, PETITIONER,

vs.

THE CITY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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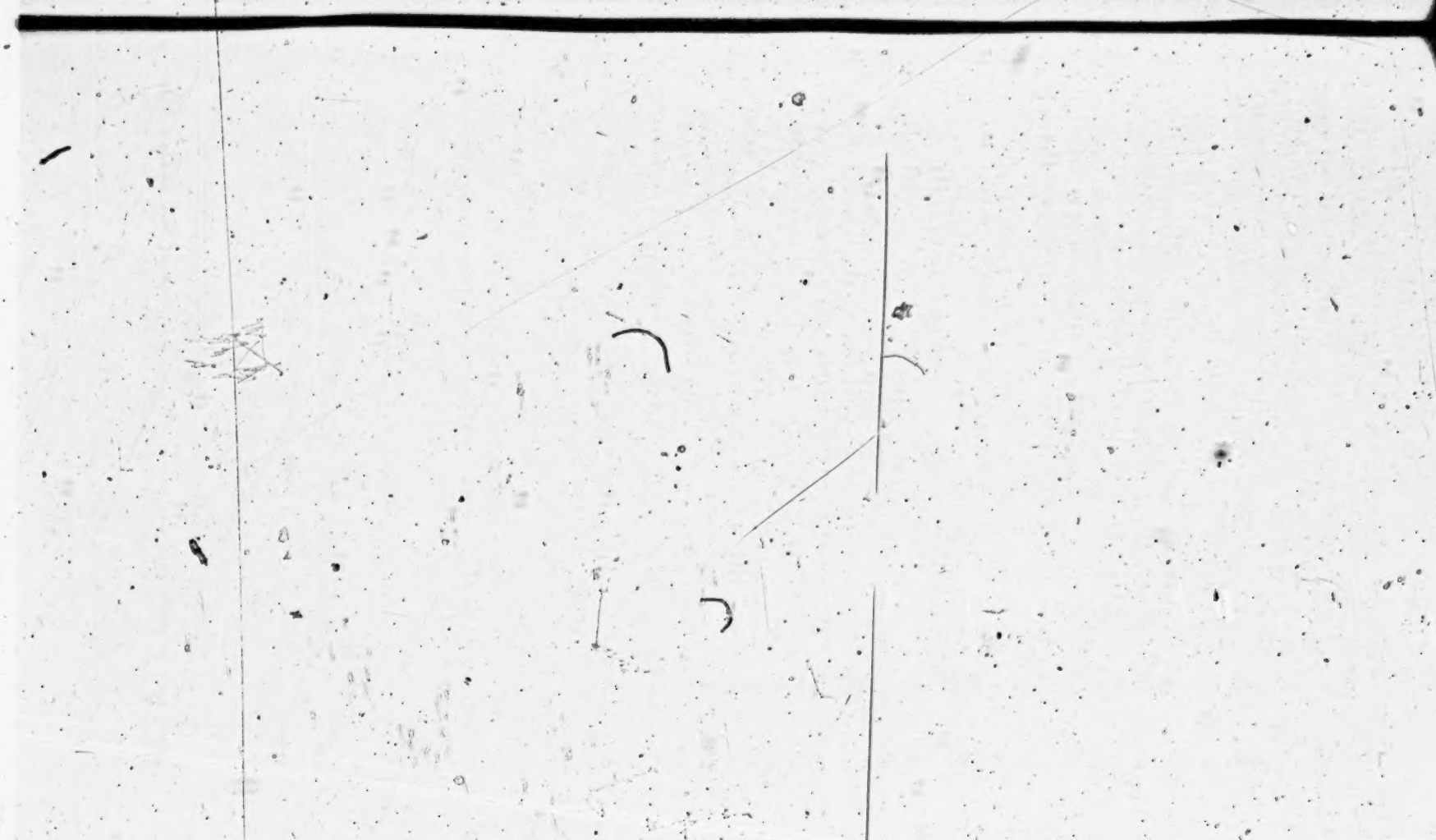
INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement on appeal	1	1
Record from D. C. U. S., Southern New York	2	1
Summons	2	1
Complaint	3	2
Answer	7	4
Jury demand	9	6
Bill of particulars	9	6
Judgment	11	7
Case containing exceptions	12	8
Appearances	12	8
Testimony of William Jacob	13	9
Edward F. Drolette	34	28
Motion to dismiss complaint	38	31
Order granting motion for non-suit on first cause of action	39	31
Colloquy between court and counsel	39	32
Remarks of court to jury as to ruling on motion to dismiss	43	35
Stipulation as to case and exceptions	53	42
Order as to case and exceptions	53	42
Notice of appeal	54	42
Stipulation as to exhibits	55	43
Stipulation settling record	56	43
Clerk's certificate (omitted in printing)	57	
Opinion, per curiam	58	44
Petition for rehearing (omitted in printing)	63	
Orders denying petition for rehearing	71	47
Judgment	74	47
Order granting motion to recall and amend mandate	76	48
Clerk's certificate (omitted in printing)	78	
Order allowing certiorari	79	48

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 15, 1941.
—7828



IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM JACOB, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Appellee

STATEMENT ON APPEAL

This suit was instituted by the service of a summons and complaint on January 31, 1939, upon The City of New York in the District Court for the Southern District of New York after plaintiff had served a notice of claim and intention to sue, the notice having been served upon the defendant, and the City Comptroller on November 28th, 1938.

The action was brought by the plaintiff to recover damages for personal injuries and maintenance and cure by reason of the said injuries sustained while in the defendant's employ on board its ferryboat "Dongan Hills" on or about October 4th, 1938.

The case was tried before Honorable Isaac M. Meekins, District Judge, and a jury (plaintiff demanded jury trial) on February 29th and March 1st, 1940. Plaintiff rested, except for the admission of medical evidence, and the Court [fol. 2] on motion of defendant dismissed the complaint. The judgment was entered on April 5th, 1940.

The notice of appeal was filed in the office of the Clerk of the District Court on May 2nd, 1940.

The plaintiff's attorney of record is Silas B. Axtell.

The defendant is represented by William C. Chanler, Corporation Counsel of the City of New York.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM JACOB, Plaintiff,
against
THE CITY OF NEW YORK, Defendant

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Silas B. Axtell, plaintiff's attorney, whose address is 80

Broad Street, New York City, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day [fol. 3] of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Charles Weiser, Clerk of the Court. [Seal of the U. S. District Court.]

Dated, January 30, 1939.

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.)

IN THE UNITED STATES DISTRICT COURT

COMPLAINT

Plaintiff above named, by Silas B. Axtell, his attorney, complaining of the above named defendant, alleges, upon information and belief, as follows:

For a First Cause of Action:

First.—The plaintiff is and for some time past has been a resident of the Southern District of New York.

Second.—The jurisdiction of this Court is predicated upon a Federal Statute, namely, the Jones Act, Section 688, Title 46, U. S. C. A., and the General Maritime Law of the United States.

[fol. 4] Third.—That the defendant, The City of New York, is a municipal domestic corporation, duly organized and existing under and by virtue of the laws of the State of New York and has an office and place for the regular transaction of its business within the Southern District of New York.

Fourth.—That at and during all the times hereinafter mentioned, the defendant owned, operated, managed and controlled a certain ferryboat known as the ferryboat "Dongan Hills".

Fifth.—That at and during all the times hereinafter mentioned, the plaintiff was in the employ of the defend-

ant, in the capacity of a water tender at the rate of wages of $2,195.00 per year.

Sixth.—That the plaintiff at and for some time prior to the date hereinafter mentioned was in the employ of the defendant in the capacity and at the rate of wages aforesaid, to perform duties on various ferryboats of the defendant including the ferryboat "Dongan Hills".

Seventh.—That on or about the 4th day of October, 1938, the aforesaid ferryboat was lying in the navigable waters of the United States at #3 slip, South Ferry, Manhattan.

Eighth.—That on the aforesaid date, while the ferryboat was at the place aforesaid, plaintiff was changing oil strainers, and, while in the course of his said employment, suddenly and without notice the wrench with which he was working slipped and plaintiff was caused to be precipitated from and fall off a platform striking and landing on a catwalk or grating with such great force and violence as to sustain serious, severe and permanent personal injuries.

[fol. 5] Ninth.—That the plaintiff thereby became sick, sore, lame and disabled; has been and will be confined to his home and bed; has suffered and still suffers great pain and agony; has been and will be prevented from working; has lost and will have to lose large sums of money which he otherwise would have earned; has paid out and will have to pay out large sums of money for his medical and surgical treatment and attention, for medicines and for his board and lodging, all to his damage in the sum of $5,000.00.

Tenth.—That the said injuries sustained by plaintiff were not due to or caused by any fault or want of care on his part, but were due to the unseaworthiness of the vessel and the negligence of the defendant, its agents, officers and employees; that the defendant failed to provide plaintiff with a safe and seaworthy vessel and with a safe and proper place in which to work, and it failed to keep the vessel, its gear, appliances, equipment and devices in a safe and proper condition and in a sane and proper state of repair; that the said ferryboat, its gear, appliances, tools and devices were old, worn and defective, and unfit for use; that the defendant failed to take such care and caution as was necessary to protect the safety of plaintiff's life and limb.

Eleventh.—That the plaintiff has given the defendant due notice of his claim and demand of intention to commence suit against it in accordance with the provisions of the New York City Charter; that the prescribed time for the defendant to adjust the claim has elapsed and the defendant has failed, neglected, omitted and refused to make an adjustment or payment thereof within thirty days after the presentation of such claim.

[fol. 6] Twelfth.—That by reason of the foregoing, the plaintiff has been damaged in the sum of $5,000.00

For a Second Cause of Action:

Plaintiff reiterates, repeats and realleges each and every allegation and all the facts hereinbefore set forth and with the same force and effect as though fully set forth herein.

Thirteenth.—That under the General Maritime Law plaintiff is entitled to his maintenance and cure and to his hospital bills for a reasonable period of his disability, and to his wages to the end of the voyage in the further sum of $3,000.00.

Fourteenth.—That by reason of the foregoing, the plaintiff has been damaged in the sum of $3,000.00.

Wherefore, plaintiff demands judgment against the defendant in the sum of $5,000.00 on the first cause of action and in the sum of $3,000.00 on the second cause of action, together with the costs and disbursements of this action.

Silas B. Axtell, Attorney for Plaintiff, Office and P. O. Address, 80 Broad Street, Borough of Manhattan, New York City.

(Verified by plaintiff on January 25, 1939.)

[fol. 7] In the United States District Court

Answer

The defendant, answering the complaint herein:

As to the First Cause of Action:

First.—Denies having any knowledge or information thereof sufficient to form a belief as to any of the allega-

tions contained in the paragraphs designated "First", "Eighth" and "Ninth".

Second.—Denies each and every allegation contained in the paragraphs designated "Tenth" and "Twelfth".

Third.—Denies each and every allegation contained in the paragraphs designated "Eleventh", except that plaintiff herein by a paper writing purporting to be a notice of claim and of intention to sue, which was presented to the Comptroller of the City of New York for adjustment and served upon the Corporation Counsel of the City of New York thereby gave notice to the defendant, The City of New York, of his intention to commence an action against it, that more than thirty days have elapsed since such presentation and no adjustment thereof has been made.

As to the Second Cause of Action:

Fourth.—Denies each and every allegation contained in the introductory part thereof, except as otherwise pleaded herein.

Fifth.—Denies each and every allegation contained in the paragraph designated "Thirteenth", except that pur-
[fol. 8] suant to the Laws of the United States of America, a seaman who becomes ill or is injured in the service of the vessel upon which he is then serving is entitled to maintenance and cure (including medical attention) and wages to the end of the voyage.

Sixth.—Denies each and every allegation contained in the paragraph designated "Fourteenth".

As a Separate and Distinct Defense Thereto, Alleges:

Seventh.—That any damages suffered or sustained by the plaintiff herein were not suffered or sustained through any negligence on the part of the defendant, its agents, servants, or employees, but were suffered or sustained through the negligence of the plaintiff or through the intervention of a cause or causes over which the defendant, its agents, servants or employees had no control or in no wise are or were responsible therefor.

Wherefore, the defendant demands judgment dismissing herein, with costs.

William C. Chanler, Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

(Verified by Russell Lord Tarbox, Acting Corporation Counsel, on March 13, 1939.)

[fol. 9] IN THE UNITED STATES DISTRICT COURT

JURY DEMAND—January 17, 1939

Sir:

Please Take Notice, that the plaintiff above named demands a jury trial in the above entitled action.

Dated, New York, January 17th, 1939.

Yours, etc., Silas B. Axtell, Attorney for Plaintiff, Office & P. O. Address, 80 Broad Street, New York City.

To: William C. Chanler, Esq., Corporation Counsel, Attorney for Defendant, Municipal Building, New York City.

IN THE UNITED STATES DISTRICT COURT

BILL OF PARTICULARS—June 22, 1939

Plaintiff, through his attorney, Silas B. Axtell, answering defendant's attorney's demand for a bill of particulars, alleges upon information and belief as follows:

(a) October 4th, 1938, at about 2:00 P. M.

(b) In the boiler room of the ferryboat "Dongan Hills", docked at Slip 3, South Street, Battery.

[fol. 10] (c) The defendant, its agents, officers and employees failed to provide plaintiff with a proper and safe staging on which to work; that the said staging was unsafe and unsecure; that the wrench which the plaintiff was using was old, worn, and defective; that the ferry was not equipped with a proper and safe wrench; that the vessel was not kept, maintained in a safe and proper state of re-

pair, nor was the same equipped with sufficient and proper tools and devices.

(d) and (e) That the chief engineer in charge had knowledge of such condition for a long period of time.

(f) 7th, 8th and 9th ribs fractured, 10th and 11th badly bruised.

(g) Plaintiff was treated at the hospital on October 4th, 1938 and confined thereto from October 4th to October 15th; confined to house from October 15th to November 9th, 1938, when he returned to work.

(h) From October 4th, 1938 to November 9, 1938. Watertender on ferryboat.

(i) 1. About $5.00 for medicines.
2. $252.00.
3. None.
4. None.

Dated, New York, June 22nd, 1939.

Yours, etc., Silas B. Axtell, Attorney for Plaintiff, Office & P. O. Address, 15 Moore Street, Borough of Manhattan, City of New York.

[fol. 11] To: William C. Chanler, Esq., Corporation Counsel, Attorney for Defendant, Municipal Building, New York City, New York.

IN THE UNITED STATES DISTRICT COURT

JUDGMENT—April 5, 1940

The issues in this action having been duly tried before Hon. Isaac R. Meekins, District Judge and a jury, at a stated term of this Court, held in and for the Southern District of New York, at the new Federal Court House, in the Borough of Manhattan, City of New York, on the 29th day of February and the 1st day of March, 1940, and the complaint having been dismissed at the close of the plaintiff's case as to the first cause of action and the defendant having offered to consent to the entry of judgment in the sum of $214.37 on the second cause of action and this offer having been refused by the plaintiff and the complaint having thereafter been dismissed as to the second cause of

action and the costs of the defendant having been duly taxed at the sum of $30.00,

Now, on motion of William C. Chanler, Corporation Counsel, attorney for defendant, it is

Adjudged, that the complaint be and the same hereby is dismissed on the merits, and it is further

[fol. 12] Adjudged, that the defendant, The City of New York (Municipal Building, Borough of Manhattan, New York City), recover of the plaintiff, William Jacob (701 East 163rd Street, Bronx, N. Y.), the sum of $30.00, costs as taxed and that said defendant have execution therefor.

Dated, April 5, 1940.

George J. H. Follmer, Clerk.

IN THE UNITED STATES DISTRICT COURT

Case Containing Exceptions

Before Hon. Isaac M. Meekins, District Judge and a Jury.
New York, February 29, 1940, 10:30 A. M.

APPEARANCES:

Silas B. Axtell, attorney and counsel for plaintiff.

William C. Chanler, Esq., Corporation Counsel, The City of New York, attorney for defendant; Alfred T. White, Esq., Assistant Corporation Counsel, of counsel.

(A jury was duly impaneled and sworn.)

Mr. Axtell: Has the City produced the wrench?

Mr. White: No. We are unable to.

[fol. 13] Mr. Axtell: I move to strike out the answer of the defendant. We served notice to produce this wrench, and that in default thereof we would so move.

Mr. White: The wrench is in the bilge of the "Dongan Hill" and we would have to put the ship in drydock to get it. We have not been able to get it.

The Court: The motion is overruled.

Mr. Axtell: Exception.

(Mr. Axtell opened the case to the jury on behalf of the plaintiff.)

(Mr. White opened the case to the jury on behalf of the defendant.)

WILLIAM JACOB, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Axtell:

Q. Mr. Jacob, you are the plaintiff in this case?
A. I am.
Q. You spell your name J-a-c-o-b?
A. Yes.
Q. Are you married?
A. Yes.
Q. Have you a family?
A. Yes, sir.
Q. You work on the City ferries?
A. Yes, sir.
Q. What do you do?
A. I am a water tender in charge of the fire room.
Q. That is different from the engine room?
A. Altogether different.
Q. How long have you been in that service?
A. Twenty years.
Q. What are your wages?
A. We get paid for the time put in.
Q. If you work more than 8 hours do you get overtime?
A. No. If you work less than 8 hours you get docked.
[fol. 14] Q. How long have you been a water tender?
A. About ten years.
Q. Before that had you been a fireman?
A. Yes, sir.
Q. How old are you?
A. 45 years old.
Q. What were you doing on the 5th of October, or is it the 8th of October, 1938—October 4, 1938?
A. Changing oil strainer.
Q. What was your work on the ship?
A. A water tender.
Q. What was the boat you were working on?
A. The ferryboat "Dongan Hills".
Q. She is in the service between South Ferry and Staten Island?
A. Right.
Q. How old a boat is she?
A. I believe she has been in service about ten years.

Q. She has one engine?
A. No, she has got two engines.
Q. Has she one propeller at each end?
A. Yes, sir, one propeller at each end.
Q. But she has two engines?
A. All hooked on one shaft.
Q. How many water tenders are there on the boat?
A. Just one on each watch.
Q. You were working 8 hours on and 16 hours off?
A. That is right.
Q. On this date, October 4th, what time did you go to work?
A. About 1:30 P. M.
Q. What time did this accident happen?
A. About 2:30,—about 2 o'clock rather.
Q. Where was the boat when the accident happened?
A. No. 3 Slip South Street.
Q. That is South Ferry?
A. Yes, that is South Ferry.
Q. Was she in operation?
Q. Well, the other crew was just discharged and we were laying there to have the other crew come on and take her to the dock.
Q. She was in operation?
A. Oh, yes, sir, she was in operation.
[fol. 15] Q. How long had she come in from a trip to Staten Island just before the accident?
A. I believe she got in at 1:30.
Q. What were your duties as a water tender?
A. To keep everything right in the boiler room.
Q. How many boilers?
A. There were four boilers.
Q. In two fire rooms?
A. Just one.
Q. Is that in the center of the ship?
A. She is more inclinded to be toward the New York end.
Q. I suppose it is pretty difficult to know just which is the front and back end of a ferry boat.
A. Yes, I believe it is.
Q. Do you have a way of telling?
A. We have our port and starboard sides.
Q. Which is the stern end, the New York end or the Staten Island end?
A. The New York end.

Q. She always ran that way, did she, one particular end always making the slip at New York?

A. No; they can head for the slip either end to.

Q. But she did go that way?

A. Yes.

Q. So the New York end was the stern end.

The Court: Where do you live?

The Witness: In the Bronx.

Q. Was the New York end the stern end?

A. Not all the time.

Q. What part of the boat were you working in when you got hurt?

A. In the boiler room.

Q. What part of the boiler room?

A. The starboard side.

Q. What were you doing?

A. Changing an oil strainer.

Q. How do you do that?

A. By the head of a manifold and taking one strainer out and putting in another.

Q. What is the manifold?

A. It is a vessel containing more than one strainer.

[fol. 16] Q. Motorists and most people having motor cars to them a manifold means something else. You say on that ship it was something connected with the oil?

A. On that particular ship.

The Court: You opened it up to clean it out.

The Witness: Yes.

Q. You had to do something with the strainer?

A. Yes, sir.

Q. How many bolts or nuts did you have to move to take off the strainer?

A. Six.

Q. What did you stand on doing that?

A. We had a platform there about 18 inches square.

Q. How high?

A. About 18 inches off the catwalk.

The Court: The standing room is 18 inches square?

The Witness: Yes.

Q. You mean it was a square box 18 inches square?

A. Yes.

Q. Was it stationary or not?
A. It was stationary.
Q. Built there?
A. Yes.
Q. What was the top of it made of where you were standing?
A. Corrugated steel.
Q. What were you wearing on your feet?
A. Leather shoes.

The Court: Did you have on any socks?
The Witness: I did.

Q. And you were using a wrench when something happened?
A. That is right.
Q. What happened?
A. In taking off these bolts and putting them on they have to be very tight, and I put a strain on them and the [fol. 17] wrench slipped and I had nothing to grab and I fell and hit an angle iron.
Q. Will you describe that wrench?
A. The wrench was well worn.
Q. What do you mean?
A. It had seen a lot of service. It had a lot of play on it.

By the Court:

Q. How long had you worked at that particular platform?
A. About 10 or 15 minutes.
Q. I mean your experience there. How well acquainted were you with that place?
A. Oh, I had worked there about three weeks.
Q. Working right there?
A. On that boat.
Q. I am speaking about the position you were in where the wrench slipped. Were you there every day?
A. No; I would be there on the average of three times a week.
Q. Were you the only one to clean strainers?
A. The water tender on the other watch did also.
Q. You would do it three times a week?
A. Yes; when I was on the day watch.

Q. You had done this three times a week for two or three weeks before the accident?

A. We used to alternate. When on the 2 to 10 watch we would take care of the strainers.

Q. Were you familiar with this place?

A. Yes.

By Mr. Axtell:

Q. Do you blame anything for this accident except the condition of the wrench?

A. Only the wrench.

Q. That is all. Describe the wrench. How long was it and what size nut did it fit?

A. It would fit a ¾ stud nut.

[fol. 18] Q. I show you a nut; is that a ¾ stud nut?

A. It is.

Q. That nut fits a ¾ stud?

A. Yes.

The Court: You were trying to remove that?

The Witness: I was trying to tighten it up.

Q. (Handing) This is a wrench that it says is 1¼ in the opening in one end and 1⅛ at the other. That is a Williams drop forge straight end wrench No. 37, purchased at Patterson Brothers a few minutes ago on Park Row. Is that the type of wrench you had?

A. It is an open end, only mine was an S-shape.

Q. The end was like this?

A. Similar, yes.

The Court: Was there anything wrong with the wrench except at the end?

The Witness: It was very loose.

The Court: A loose fit?

The Witness: Yes, sir.

Q. What is this I show you?

Mr. White: I object to this other kind of a wrench that Mr. Axtell now has.

Mr. Axtell: I propose to show that this is the proper wrench to use, built by the manufacturers of the bolt and built for that purpose.

Mr. White: I object to such statements as improper.

The Court: We are trying this case on the wrench he did have.

Mr. Axtell: We say they failed to furnish proper tools and equipment.

The Court: You may show that, but not by using some other kind of a wrench.

[fol. 19] Q. Was there any other wrench on the boat that would fit that stud?

A. Not that I know of.

Q. Did you make inquiries to get a better or another wrench?

A. I did.

Q. From whom?

A. The chief engineer.

Q. Did you show him the wrench you had been using?

A. No. I told him the wrench I had was very bad.

Q. What did you tell him exactly?

A. I told him I would like to have a new wrench.

Q. What did he say?

A. He said for me to look in the tool closet and see if there was one in there; and I went up there and couldn't find any and I believe he said he sent an order out for one.

Q. How long before that, before the accident, did you report that?

A. I guess two or three days before.

The Court: Had the wrench been slipping before that?

The Witness: Yes, she was.

Q. Where were the tools kept on this ship?

A. In the engine room.

Q. Was there a place for them?

A. There was a tool locker there.

Q. What do they call it?

A. A tool locker.

Q. Anybody in charge of it?

A. Well, the chief engineer, I suppose.

Q. On a big ship they have a storeroom and have a man in charge of the tools and he checks out everything.

A. No, there was nobody in charge.

Q. It was just a place where tools were supposed to be put when not in use?

A. Yes, sir.

Q. You looked over all they had there?

A. I did.

Q. You found no end wrench?

A. That is right.

[fol. 20] Q. What about socket wrenches of this type (indicating); were there any socket wrenches that would fit that 1¼ inch nut?

A. None that I seen.

Q. There were not. Did you ask the engineer for a socket wrench?

A. Not a socket wrench. I just asked for a new wrench.

Q. What is a socket wrench?

A. A wrench where the nut is inserted right into the wrench.

Q. Do you see anything around here that looks like a socket wrench?

A. There is one on the table.

Mr. White: I object to that and move to strike it out.

The Court: I will rule that out. He said he didn't ask for one of that kind. He asked for a new wrench.

Q. Was the subject of a socket wrench mentioned?

Mr. White: That is objected to.

The Court: Yes, it is leading.

Mr. Axtell: I direct your Honor's attention to the 10th paragraph of the complaint in which it is alleged, "That the said injuries sustained by the plaintiff were not due to or caused by any fault or want of care on his part, but were due to the unseaworthiness of the vessel and the negligence of the defendant, its agents, officers and employes; that the defendant failed to provide plaintiff with a safe and seaworthy vessel and a safe and proper place in which to work, and it failed to keep the vessel, its gear, plant, equipment and devices in a safe and proper condition and in a safe and proper state of repair; that the said ferryboat, its gear, appliances, tools and devices were old, worn and defective [fol. 21] and unfit for use; that the defendant failed to take such care and caution as was necessary to protect the safety of plaintiff's life and limb."

Mr. White: Mr. Axtell has stated that the only basis of his claim is on the wrench.

Mr. Axtell: Yes.

The Court: Well, then get right to the wrench.

Q. Have you a general knowledge of the kind of wrenches that are usually provided for removing nuts on studs?

Mr. White: I object to that, your Honor.

The Court: I will overrule that. He may tell his knowledge.

Q. Didn't you hear the question?

A. I thought it was ruled out.

The Court: Go ahead and answer.

A. Yes, I am familiar with the wrenches.

Q. What kind are usually used for removing studs on strainers and cylinder heads?

Mr. White: That is objected to as incompetent, irrelevant and immaterial, as to what is usually used.

The Court: Do you know?

The Witness: Yes; a straight open end wrench.

Mr. Axtell: I offer this stud and wrench to be marked for identification.

(Marked Plaintiff's Exhibits 1 and 2 for identification.)

The Court: If you desire to do so it may be marked as illustrating the witness's testimony.

[fol. 22] Q. I want you to take this open end wrench and just show the jury, using that to illustrate with, what you say was the matter with the other wrench?

A. There was play in the jaws; it was worn.

Q. How much play was there?

A. A sixteenth of an inch.

Q. How did you go about what you were doing?

A. I got a grip with my wrench on the nut and I put a slow strain on it and then got harder and harder.

Q. And what happened?

A. It slipped.

Q. When it slipped what happened to you?

A. I lost my balance and went off the platform and found myself in the passageway.

Q. What did you strike against?

A. An angle iron.

Q. What is an angle iron?

A. It is alongside the passageway, over the edge.

Q. What is an angle iron?

A. It is an iron with three angles.
Q. A crooked or bent iron?
A. Yes.
Q. You mean by that an elbow, don't you?

The Court: Not necessarily. It seems to me angle iron speaks for itself.

Q. How wide was the angle iron?
A. About 3 inches.
Q. How long was this piece?
A. She goes along the passageway, that is right on the end.
Q. On the floor?
A. No; along the end of the passage.
Q. On the deck?
A. I am up on the catwalk. It is right on the edge and the purpose of it is that nobody can slip off it.
Q. What part of your body came in contact with that?
A. My right side.
Q. Did you feel anything?
A. Oh, yes, severe pain.
Q. Were you able to get up?
A. With the assistance of one of the men I was working with.
[fol. 23] Q. Is the man in court?
A. Yes, sir, Mr. Caston.
Q. Which is Mr. Caston?
A. That one standing up.
Q. He was nearby at the time?
A. He was.
Q. What was his job?
A. Cleaning burners and the like.
Q. Is he a fireman?
A. Yes, he is a fireman.
Q. What did you do after that?
A. He assisted me to the floor and I sat down until I got my breath. It took about 15 minutes, and then I reported to the chief engineer.
Q. How far did you fall from the place you were standing on?
A. The platform is 18 inches plus my own height.
Q. In other words, the thing you fell on was on a level with the base of the platform?

A. No; it was 18 inches above what I fell on.

Q. The top of the platform was 18 inches above the thing you fell on?

A. That is right.

Q. So it was like if you were standing here, you went right down?

A. Yes sir.

Q. Was your arm extended?

A. I tried to protect myself, but there was nothing there to grab.

Q. What was done with you after that?

A. I reported into the chief engineer and I told him I had a bad fall, and he asked me if I wanted first aid and I said yes. I said, "I think if you strap me up a bit I will be all right in an hour."

Q. Did they call somebody?

A. No; he dressed me himself.

Q. On the ship?

A. On the ship.

Q. And you continued on duty all day?

A. No. I went about two hours longer and then I couldn't stand it any more.

Q. You had pain all the time?

A. Constant pain.

Q. Describe the pain, where it was.

A. My whole side. I could hardly breathe.

Q. You had difficulty in breathing?

A. It was very hard, and it hurt.

[fol. 24] Q. Were you able to work?

A. There wasn't very much I could do. We went to the oil docks to fill up.

Q. How soon after you were hurt did you go over there?

A. About 15 minutes, I should judge.

Q. What did they do with you then?

A. Well, I was trying to do whatever I can so far as watching the water and so forth, and when we came to New York, and then we went to St. George, and I asked the fireman to put somebody in my place.

Q. How did you get out of the fireroom?

A. I climbed up a ladder.

Q. What kind of a ladder, a perpendicular ladder?

A. She is at an angle.

Q. With rungs in it?

A. Yes.
Q. A rail on the side?
A. Yes.
Q. It is a pretty steep ladder?
A. Not that one.
Q. It is not the one you go down to the hold on in a boat?
A. No, sir.
Q. Were you taken to the hospital?
A. I was.
Q. Did an ambulance come?
A. They got a car, one of the cars from the department.
Q. To what hospital did they take you?
A. The Marine Hospital.
Q. At Stapleton, Staten Island?
A. Yes sir.
Q. What did they do for you there?
A. They strapped me up again.
Q. Did they X-ray you?
A. No; the doctor said the X-ray room was closed right at that time.

Mr. White: I move that that be stricken out.
Mr. Axtell: I consent.

Q. They didn't X-ray you that day?
A. They did not.
Q. Did they put you to bed?
A. I wanted to go home and they told me——
[fol. 25] The Court: Did you go home?
The Witness: Yes, sir.
The Court: And you came back when?
The Witness: Next morning.

Q. How did you feel that night?
A. It took quite a while to get to sleep, but when I got to sleep I was all right.
Q. Did you have pain?
A. Going to sleep, yes.
Q. Did you go to a doctor?
A. No.
Q. You went back to the hospital when?
A. The next morning.
Q. Why?
A. Well, I had an arrangement there.

Q. Did they X-ray you then?
A. They did.
Q. Did they do anything further to you?
A. They put me in bed.
Q. How long were you in bed?
A. Three weeks.
Q. How long did you stay in the hospital?
A. The day they let me go out they gave me a temporary total disability.
Q. After you left the hospital how did you feel?
A. I didn't feel too good.
Q. What did you do, stay home for a while?
A. I had to.
Q. Were you confined to the house?
A. I was.
Q. How long?
A. About three more weeks.
Q. You didn't do any work?
A. No.
Q. Then what did you do, did you return to duty?
A. Yes.
Q. You went back to the ferry?
A. Back to the ferry.
Q. How long were you out of work that you didn't get wages?
A. About six weeks or more.
Q. Then when you did return to work how did you feel?
A. I didn't feel too good.
Q. How are you now, do you feel any trouble, any pain?
A. When I overtax myself.
[fol. 26] Q. What is the effect?
A. I feel as if something was pulling away. I feel pain there when I overtax myself.
Q. When you undertake strenuous work you find what?
A. I get a pain.
Q. You were indicating on your right side?
A. Yes, sir, on my right side.
Q. You were informed you had some injury to your ribs or something?
A. I was.

Mr. White: That is objected to and I move to strike it out, what he is informed.
The Court: I think I will leave that in.

Mr. Axtell: I have a transcript of the hospital record. I suppose there is no objection to my offering them.

Q. Did you have any limitation of motion of your arm or body?

A. No.

Q. Is your strength impaired in any way?

A. Only to the extent that when I work a little too hard I don't feel the way I usually should.

Q. Did you go to collect or try to collect your wages from the time away from work?

A. I did.

Q. Whom did you go to?

A. To the Corporation Counsel, and I went into information and he sent me into the doctor, and the doctor told me to take off my shirt and he looked me over and he said to come back in a couple of days, and I went back about four times, and I says, "Well, Doc., up to now?"——

Mr. White: I object to the conversation.

Q. Did they ever offer to pay you wages?

A. No.

Q. Did you ask for them?

A. I did.

[fol. 27] Q. With reference to this wrench, where is that straight end wrench—was it just like that straight end wrench or different?

A. It was an S-wrench.

Q. You mean it had a crook in it?

A. Yes.

Q. Will you draw a picture of an S-wrench? Hold it up here a minute. How about this surface of it (indicating)?

A. Somewhat bent there.

Q. It had a bend in it?

A. Yes.

Q. In what way was it bent? You have indicated something with your fingers.

A. That way.

Q. You mean you put the wrench on the level like on this board, one end would be raised?

A. Yes, sir.

Q. It had a bend in the middle as well as the S-part?

A. That's right.

Q. It was bent two ways, to be something like a socket wrench?

A. I don't know what the idea of it was.

Q. Did you need a socket wrench for that job?

A. A socket wrench could be used very handy.

Mr. White: That is objected to as calling for a conclusion.

The Court: Objection sustained.

Cross-examination.

By Mr. White:

Q. As a matter of fact you were only in the hospital ten days?

A. More than that, sir.

Q. I call your attention to this testimony which you gave under oath January 10, 1939, at your examination before trial. I ask you if you were asked these questions and gave these answers:

"Q. How long were you in the Marine Hospital?

"A. Ten days."?

Is that what you said?

A. Yes. I went in there; I was admitted the 5th,—reported the 4th, admitted the 5th, and discharged with a temporary disability the 15th.

[fol. 28] Q. And they told you you would be all right in three weeks?

A. Well, I had to report for treatments.

Q. As a matter of fact you went back to work the 10th of November?

A. I did.

The Court: When were you hurt?

The Witness: The 4th of October.

Q. And your wages were $7 a day and you worked six days a week?

A. That is right.

The Court: Did you have any doctor's bills to pay?

The Witness: No, sir; the Marine Hospital took care of that.

The Court: You just lost the time at $7 a day?

The Witness: That is right.
The Court: Six days a week?
The Witness: That is right.

Q. You didn't have any private doctor at all, did you?
A. No, I did not.
Q. Now as water tender you were in charge of the boiler room there?
A. That is right.
Q. And it was up to you to keep things in order and to get the equipment you needed, that was your job?
A. That is right.
Q. And if you didn't have any equipment that was needed, there was a regular way of requisitioning that?
A. Reporting it to the chief.
Q. The chief engineer had a set of tools besides yours, didn't he?
A. He did.
Q. And if it was necessary at any time, you could use his tools to do this work if it became necessary?
A. If he had them.
[fol. 29] Q. On this day he had a whole set of tools and wrenches, didn't he?
A. No.
Q. Did you look in his tools?
A. I did.
Q. And you didn't find any wrenches?
A. Not one to fit.
Q. What kind of wrenches did he have there?
A. I guess he had various sizes.
Q. He had a Stillson wrench?
A. I don't know if he did or not.
Q. That is one thing you overlooked?
A. I don't know.
Q. He had adjustable wrenches, end wrenches, adjustable ones?
A. No, he didn't.
Q. You don't know about that?
A. No, he didn't have that; they didn't come on the boat.
Q. Did he have what is commonly called monkey wrenches?
A. I believe he did.
Q. Of course, you can use that on any nut?
A. Probably.

Q. You have used them lots of times yourself, haven't you?

A. Yes.

Q. You have used monkey wrenches and Stillson wrenches lots of times on all kinds of nuts, haven't you, and you say this nut was just like the nut you were working on?

A. Yes, sir.

Q. There is nothing peculiar about this nut from any other nut that it cannot be turned with a monkey wrench or Stillson wrench?

A. I inquired for a wrench.

Q. He had them there?

A. I don't think he did. If he did he didn't give me any.

Q. What time of day did you ask for a wrench?

A. That particular day I didn't ask. I was in there various times.

The Court: You mean the day you got hurt you didn't ask?

The Witness: No, sir; I used that wrench.

[fol. 30] Q. When do you say you asked for a wrench before that, if at all?

A. The time before when I was working on that particular job, about two days before.

Q. Where did you talk to the chief engineer?

A. In the engine room.

Q. You mean he was in his place?

A. In his place.

Q. Where he kept his tools?

A. I don't know where he keeps his personal tools.

Q. I am referring to the ship's tools for the engineer.

A. Yes, sir.

Q. There were several sets of tools on the boat?

A. I wouldn't say that.

Q. How often did you dock at the New York end and Staten Island end of the ferry?

A. Oh, an average of six or seven times each day.

Q. And you could have sent out for a wrench; if it was badly needed you could have sent out for a wrench several times a day?

A. Yes, if they have them in the storeroom.

Q. They have a storeroom with a full assortment of tools?

A. I don't know what they have got out there.
Q. You didn't go into that?
A. All I am supposed to do is to order.
Q. Of course, this end wrench that you had been using before and you used on this day, had been used to take the strainer on and off several times before?
A. It had.
Q. You say you were putting a great deal of strain on this nut, is that right?
A. Yes, sir.
Q. Did you brace yourself against anything when you pulled on the wrench?
A. I did have an iron rod there.
Q. You mean one of the pipes right next to the wall?
A. It is a strongback.

Mr. Axtell: I move to strike out the pipes against the wall.

[fol. 31] Q. There were pipes against the wall?
A. I was not near the wall.
Q. There were no pipes near the wall?
A. I was not near a wall.
Q. How far were you off from the wall?

The Court: He says he was not near a wall.

Q. How far were you from the wall?
A. The hull of the ship?
Q. Yes.
A. About 3 feet.
Q. And there were some pipes between you and the wall, weren't there?
A. Yes, there were.
Q. How far away were those pipes?
A. One or two feet from me.
Q. Were they on the same level with your feet or where?
A. A little above my head.
Q. What was it you braced yourself on when you put the strain on the wrench?
A. A rod coming down from the deck of the ship; I guess it was to hold the catwalk up.

The Court: Did you take hold of that?
The Witness: I did as far as I could reach. I braced myself.

Q. You didn't hold with your hand?

A. No, I was pressing myself against that.

Q. In your experience hadn't you found before if you put that much strain on a wrench on a nut it is very apt to slip, any wrench or any nut? Isn't that true?

A. Yes.

Q. And that is particularly true when the nut has been in use before and the wrench has been in use before?

A. That is true.

Q. That is the usual course of experience, isn't it?

A. That is right.

[fol. 32] Q. Nothing odd about that. As a matter of fact, you have worked around machinery for how long?

A. About 20 years.

Q. And this is not the first time you have had a wrench slip off a nut?

A. Probably not.

Q. It happens all the time; it happens every so often, doesn't it?

A. Oh, no.

Q. Well, wrenches slip off nuts for a number of reasons?

The Court: You have been over that. He says they do.

Q. How many times did you change the wrench on the nut while you were tightening it up?

A. I got about four tightenings before the thing slipped.

Q. In other words, you turned it so far and put it back on and turned it again?

A. Yes.

Q. How much thread was there on this bolt?

A. Abont ⅝.

Q. ⅝ths of an inch?

A. Yes, sir.

Q. Was there as much thread as there was on this bolt you have in front of you—I mean the nut?

A. Just about.

Q. So in all you changed your wrench on the——

The Court: He said he did four times at least.

Q. Four or five times?

A. Yes.

Q. Did you do it four times before you put it on the last time?

The Court: That is what he said.

Redirect examination.

By Mr. Axtell:

Q. How about these wrenches which go clear around the nut, the end wrenches; did they have any of those aboard?

A. No.

[fol. 33] Q. You know what I mean, such as I have shown you?

A. You mean a ratchet wrench?

Q. Yes.

A. No, there were none of those on board.

Q. How many times before this accident had you requested the engineer for a wrench?

Mr. White: Objected to as repetition.

The Court: Go ahead.

Q. How many times before had you asked for a wrench?

Mr. White: That is objected to.

The Court: I will let you ask.

A. I should judge three times.

Q. How long had you been on the boat when you asked the first time?

A. Well, the first opportunity I had to change the strainer.

Q. The first time you used it?

A. The first time I used it.

Q. When was the next time after that?

A. When I had to use it.

Q. And none was provided?

A. No, not up to that.

Q. How much play was there in that wrench?

The Court: He said about a sixteenth of an inch.

Q. When you put the wrench on there——

The Court: He has answered that, about a sixteenth of an inch.

Q. Assuming your wrench was on as I have it on the nut, how much would it move back and forth?

A. About 1/16th in here.

[fol. 34] Q. How much would the handle move back and forth?

, A. I would say about an inch, from the length of the wrench I had.

Q. How long was the wrench?

A. About 18 inches.

The Court: Have you any further evidence to offer, Mr. Axtell, about the wrench?

Mr. Axtell: Not that particular wrench. I have an expert.

Edward F. Drolette, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Axtell:

Mr. Axtell: I offer this transcript of the hospital record.

Mr. White: I object to it as incompetent, irrelevant and immaterial. In the first place, it is only a copy, and in the second place it is not admissible in evidence. I will concede the man went into the hospital; there is no question about that. But under our law as followed by the federal courts, hospital records are not admissible in evidence.

The Court: I don't know about this. If this is a copy you will have to wait for the original anyway.

Mr. Axtell: I ask counsel to produce the transcript from his file.

Mr. White: Here it is, but I object to it on the same ground.

The Court: You say under the New York law that is not admissible.

Mr. White: Yes.

Mr. Axtell: The statute says it is admissible.

[fol. 35] The Court: What is the theory of it?

Mr. White: I will concede when he went into the hospital and when he left.

Mr. Axtell: These hospital records have been admitted in this court for 20 years, and I never heard them objected to by counsel before.

Mr. White: No, I do not think that is so.

Mr. Axtell: You haven't been here for 20 years.

Mr. White: I have been here quite often for the last few years.

Q. What is your occupation?
A. I am a marine chief engineer.
Q. What license do you hold?
A. Chief engineer's license.

Mr. Axtell: May I ask the plaintiff a question here?
The Court: Yes.
Mr. Axtell: Mr. Jacob, you may stay right where you are. Just tell us what type of burners and oil equipment was on this boat?
Mr. Jacob: The Todd system.

Q. How long have you been going to sea?
A. About 25 years.
Q. How long have you been licensed as a chief engineer?
A. About 20 years.
Q. How long have you had your chief engineer's license did you say?
A. 20 years.
Q. How old are you?
A. 41.
Q. You are mistaken about the date, aren't you? You didn't have a chief engineer's license that long?
A. I was the youngest chief engineer licensed in this country. I was 21 years old when I got it.
[fol. 36] Q. I thought you must have slipped up on your dates or your age or something. Pardon me. Well, how many different vessels have you worked on?
A. In that period of time I was at sea?
Q. Yes.
A. I should say about 200.
Q. Are you familiar with the Todd system of oil burners?
A. Very well.
Q. Are you familiar with the strainers Mr. Jacob has been talking about?
A. Yes, I am familiar with the strainers on the Todd system.
Q. And the studs they have to remove to change strainers?
A. Yes, sir.
Q. You have done that?
A. I have supervised the work.
Q. What is the usual method of removing those strainers?

Mr. White: I object to the usual method as immaterial and irrelevant.
The Court: Sustained.

Q. Is there any usual and customary way of removing strainers?

Mr. White: The same objection.

The Court: Sustained.

Mr. Axtell: Exception.

Q. Is there any general custom or practice with regard to the supply and use of tools for removing strainers in the Todd system?

Mr. White: The same objection.

The Court: Sustained.

Mr. Axtell: If your Honor please, the rule is well settled in this court in the case of DeVries v. Standard Oil, 3 Fed. [fol. 37] (2d), page 852 that evidence as to customary use and practice in machinery, appliances and gear is admissible, that is, evidence of general custom and practice.

Mr. White: Not in this class of cases.

The Court: No, sir; that is why I am holding this way. An exception to the plaintiff.

Mr. Axtell: We charge that they failed to furnish a proper tool and appliance, and I am trying to prove the kind of tool and appliance they should have used, which was not a straight end wrench.

The Court: I give you an exception.

Q. What are the sizes of straight end wrenches?

Mr. White: I object to that as incompetent, irrelevant and immaterial.

The Court: The objection is sustained and the plaintiff has an exception.

Q. What is the difference between a straight end wrench and a socket wrench?

Mr. White: The same objection.

The Court: Sustained, and the plaintiff has an exception.

Q. I will ask you this question: Is it not true that ordinarily every engine room is equipped with a set of socket wrenches?

Mr. White: I object on the same grounds.

The Court: I sustain the objection with an exception to the plaintiff.

(No cross examination.)

[fol. 38] Mr. Axtell: I cannot proceed with the case if the federal government does not produce the hospital records.

The Court: What do you want to show by that, his trouble?

Mr. Axtell: Yes, sir.

The Court: Can't you stipulate that?

Mr. White: Yes, sir, three ribs fractured, ordinary fractures, and he was out from the 4th of October and went back to work on the 10th of November.

Mr. Axtell: And there was a compression of the chest.

Mr. White: If you want to go into details you will have to get the doctor.

The Court: That is not necessary in my view of the case.

Mr. White: I will concede that, but that is as far as I will go.

Mr. Axtell: I ask opportunity to find out why the doctor and hospital records are not here.

The Court: You can have the doctor here at the next session. I am going to adjourn at 12 o'clock.

Mr. Axtell: The plaintiff rests except as to his medical proof.

The Court: The plaintiff rests and reserves the right to introduce medical evidence if necessary later.

MOTION TO DISMISS COMPLAINT

Mr. White: At this time the defendant moves to dismiss the complaint upon the grounds that plaintiff has failed in his proof, has failed to introduce proof sufficient to constitute a cause of action.

The Court: As I understand, he alleges two causes of action.

[fol. 39] Mr. Axtell: For damages and maintenance and cure.

Mr. White: As to the loss of wages we have offered to settle them, and we will do that now.

The Court: You are now moving to dismiss the action, and the first cause of action is negligence.

Now put this down, Mr. Reporter: The defendant moves for judgment of non-suit on the first cause of action in this case.

ORDER GRANTING MOTION FOR NON-SUIT ON FIRST CAUSE OF ACTION

The motion is allowed and the plaintiff excepts.

Now as to the other cause of action you will have to try that out.

Mr. Axtell: Your Honor means that you do not allow the jury to pass on the question of the wrench?

The Court: No, sir; I am holding under the simple tool doctrine.

Mr. Axtell: I never heard of it.

The Court: Well, if you want them I will give you some cases.

Mr. Axtell: Well, your Honor, I have cases to the contrary.

The Court: The first case I have in mind is Newbern v. Great Atlantic & Pacific Tea Company. That is from the Fourth Circuit, and it is reported in 68 Fed. (2d), at page 525. I tried that case. And there are a number of other cases on the simple tool doctrine. That is why I didn't let this expert testify.

Mr. Axtell: It is contrary to the law as settled in this district.

The Court: It may be, but I have given you an exception to my ruling, and you may now travel along on the other causes of action. I have gone as far as I can with you. He knew just as much about that wrench as the ferryboat peo-[fol. 40] ple. He was familiar with it. It was an accident pure and simple. He didn't have to use it.

Mr. Axtell: Was he supposed to furnish his own wrenches?

The Court: No; but he had other wrenches. It was a simple tool.

Mr. Axtell: Your Honor doesn't suggest that a man should use a Stillson wrench?

The Court: Just let me read this to you. The simple tool or appliance doctrine is concisely stated in Newbern v. Great Atlantic & Pacific Tea Company. That is the case that I just gave you the citation of. In that case the Court said this:

"It is well settled that while it is the duty of the master in exercise of reasonable care for the safety of the employee to see that machinery and appliances which may cause injury to him are in reasonably safe condition. This duty does not ordinarily exist with respect to simple tools from the use of which no danger is reasonably to be apprehended or as to which the employee is in a better position than the master to discover defects."

Now, in that case the plaintiff alleged that he was not furnished with a safe place to work and with safe and suit-

able appliances, in that a floor scale was defective, unsafe and dangerous. In particular it was alleged that the wheels were old, broken and in a dangerous and unsafe condition and not sufficient and adequate to enable the scale to be safely moved by the defendant's employees. The plaintiff was injured when one of the wheels came off, causing the right side of the scale to drop and the left side to rise. Now [fol. 41] it is an interesting feature of this case that the plaintiff stressed that the North Carolina law precluded the defense of assumption of risk, which defense, likewise, does not bar a suit by a seaman. The Court brushed aside the plaintiff's contention that the simple tool doctrine was but an application of the defense of the assumption of risk, and therefore could not be applied.

You have your exception.

Mr. White: The defendant consents to a judgment for loss of time which is the only damage shown by the plaintiff's testimony that he suffered which would be recoverable under the second cause of action, that is the loss of wages. There are no hospital bills or medical bills.

Mr. Axtell: The plaintiff refuses to accept any such judgment. You are applying a rule of North Carolina which does not apply here and I most heartily disagree with your Honor.

The Court: You have a right to do that.

Mr. Axtell: I did not mean to be disrespectful to your Honor, and if I was I apologize. I cannot see but that there is a question here for a jury. I really think under all the circumstances your Honor should grant a mistrial.

The Court: It is my view that this man cannot recover against the City of New York in view of the state of the record. As I say, I may be wrong, and if I am there is a circuit court that can correct my error.

Mr. Axtell: I would request your Honor to defer judgment until I submit authorities that I think are controlling.

The Court: Of course, I will be glad to hear any authorities that you have. I am going to leave here tomorrow and there is no session tonight.

[fol. 42] Mr. White: The proposition is so simple——

The Court: Mr. Axtell asks to be heard, and as a matter of courtesy I will hear him. If you have some citations that you wish to present, why, I will let you present them tomor-

row morning. The jury will be excused until tomorrow morning at 10 o'clock.

(Adjourned to March 1, 1940, at 10 A. M.)

New York, March 1st, 1940, 10:30 o'clock a. m.

Mr. Axtell: Will your Honor rule on my motion or does the ruling stand?

The Court: I will rule on both of them at the same time, and also I want to make some remarks to the jury.

On the question of the hospital records I did not exclude them on any theory except that the defendant was entitled to cross-examine the man who made them. In order for the Circuit Court to know what they contain the hospital records shall constitute a part of the record over the objection of the defendant.

Mr. White: I have no objection to them being marked for identification.

Mr. Axtell: I want them in evidence.

The Court: I will have to exclude them as evidence, but they can go to the Circuit Court that it may consider their contents and determine whether they should have been admitted. If the Circuit Court doesn't know what is in the records it would not know whether their contents were competent evidence.

At the close of the plaintiff's testimony, and after the plaintiff announced that he had rested, the defendant moved [fol. 43] for a judgment of non-suit, and the Court allowed the motion over the objection and exception of the plaintiff. Subsequently plaintiff's counsel asked the Court to hear argument at some length after preparation of a written memorandum on the question of striking out the Court's ruling granting the judgment of non-suit, and permitting the case to go in regular order to the jury for determination on the question of negligence. That is on the first cause of action set out in the complaint.

The Court took a recess at about noon on February 29th, 1940, and reconvened at 10 o'clock on Friday, March 1st. Counsel for plaintiff was recognized and stated he would need ten minutes to present his facts. The Court listened to his argument for a period of twenty-five minutes. At the close of the argument by plaintiff's counsel on March

1st defendant's counsel answered for a period of about ten minutes. Each side so far as the Court is advised had full opportunity to present its respective views as to the Court's granting of the motion for judgment of non-suit.

REMARKS OF COURT TO JURY

Now, ladies and gentlemen of the jury, I am unwilling for you not to be fully acquainted with the purposes which prompted the Court's rulings.

I am not troubled about the question of assumption of risk in this case. I do not think that doctrine applies. What troubles me about the case is the doctrine of simple tool. Of course that is not apparent to you, being laymen and not lawyers, but there is such a doctrine in the books, and there is a wealth of authority on both sides of the question. The plaintiff's counsel here has at length read extracts from the decisions which he says are in point in support of his position. Defendant's counsel has cited the Osceola case, which I think was a case from the Eastern District of Virginia.

On a motion for a judgment of non-suit against the plaintiff all the facts in the record must be interpreted in the [fol. 44] most favorable light to the plaintiff, and I have undertaken to do that. It is my view that the plaintiff on his own statement as set out in the record, not only on direct, but on cross examination, failed to establish a case of negligence which would justify the submission of that issue to the jury.

My recollection of what this gentleman (the plaintiff) said is that the wrench was an old one and had been used for a long time there, and that there was nothing wrong with the wrench except that it had become worn about one-sixteenth of an inch in the bite, that is, the opening which fits around the nut that is supposed to be tightened or loosened as the case may be. That it was not an S-wrench but a straight one. And his testimony was illustrated by a new wrench recently purchased to exhibit to the jury. That he was thoroughly familiar with the wrench and its proper use. He stated that for three or four weeks, he had used it on several occasions each week. That he had told his immediate superior that they needed a new wrench, that this one was worn, and his superior told him he would send in a requisition for a new wrench. He stated there was a

tool-chest belonging to the chief engineer, I think—certainly there was one on the boat,—in which there were other wrenches, and that he was at liberty to use them if he saw fit; he was not excluded from the use of them. And I think he described the kind of wrenches. I think he said there was a monkey-wrench among them. He described the platform and what he was doing at the time he was hurt.

On cross examination of the plaintiff by defendant's counsel, a stronger case was made against the plaintiff than on direct examination of the plaintiff. It is the plaintiff's testimony alone that I am considering here. He himself used the device—the wrench. It may be that the accident occurred by reason of the wrench being worn, or it may be that it did not occur from any such reason. He [fol. 45] might not have carefully manipulated it. The burden was on him to show how and why the injury occurred and that the alleged negligence was the proximate cause of the injury which he sustained. Counsel said, "Oh, yes, if he had another wrench, this might not have happened." Precisely! That reminds me of the story of a stranger who asked a local man: "Which is the best hotel in this town?" And the man said: "Well, there are two, if you go to one you will wish you had gone to the other." The illustration of counsel about the other kind of a wrench, was insidious and ingenious. I was interested in his presentation of his motion this morning, which was intelligent and it may be to the point. But I think not. But even in using the wrench he described, it would be possible for that to slip also. It depends on whether the operator properly adjusts it. We cannot go into the realm of speculation about these things.

My recollection is fairly clear on this simple tool doctrine by reason of the fact that I tried a case in the Fourth Circuit: Newbern v. Great Atlantic & Pacific Tea Company some time ago.

I ask your indulgence to tell you why I have made this decision, and also to give the Circuit Court the benefit of the reasons that prompted me to make the ruling.

The simple tool or appliance doctrine is concisely stated in Newbern v. Great Atlantic & Pacific Tea Co., 68 F. (2d) 523, and I quote—the Court said in the Newbern case:

"It is well settled that, while it is the duty of the master, in exercise of reasonable care for the safety of the employee, to see that machinery and appliances which may

cause injury to him are in reasonably safe condition, this duty does not ordinarily exist with respect to simple tools from the use of which no danger is reasonably to be appre-
[fol. 46] hended or as to which the employee is in a better position than the master to discover defects."

Some statement was made by counsel while illustrating a cable that broke, that the duty devolved on the defendant to furnish absolutely safe equipment. I do not understand that to be the law. It is the duty of the master to exercise reasonable diligence and care, to provide reasonably safe tools and appliances. The master does not guarantee. The duty does not ordinarily exist with respect to simple tools from the use of which no danger is to be reasonably apprehended and as to which the employee is in a better position than the master to discover defects. Numerous authorities were cited by the Circuit Court of the Fourth Circuit in the Newbern case.

In that case the facts were in substance as follows: The plaintiff alleged that he was not furnished with a safe place in which to work and with safe and suitable appliances, in that a floor scale was defective, unsafe and dangerous. In particular, it was alleged that the wheels were old, broken and in a dangerous and unsafe condition and not sufficient and adequate to enable the scale to be safely moved by the defendant's employees,—rolled from one place to another or from one platform to another. The plaintiff was injured when one of the wheels came off causing the right side of the scale to drop and the left to rise. The right side went down on his foot and crushed it to some considerable extent. He was seriously injured, not permanently however.

The Court, at page 525, said:

"The rule that the master is not ordinarily liable for defects in simple tools is based upon the idea that ordinarily the employee has better opportunity than the master to observe such defects and guard himself against them, and
[fol. 47] that the master should not be charged with the duty to care for the safety of an employee with respect to a matter as to which the employee is in a better position to care for himself."

And then the Court cites Vanderpool v. Partridge in 13 L. R. A.:

"But it is also to be observed that the non-liability of the master for defects in simple tools is based upon the

fact that ordinarily, as in the case at bar, no danger to the employee is to be apprehended from defects therein which he cannot easily guard himself against. Ordinarily, they are reasonably safe for the use for which they are intended; and the duty of the master is not to furnish tools free of defects, but tools that are reasonably safe."

That is the rule.

In 13 L. R. A. (N. S.), at page 688, a law treatise of great standing and force and acceptability to the highest courts in the land, I find the following:

"The rule of respondeat superior rests upon the assumption that the employer has a better and more comprehensive knowledge than the employee, and therefore ceases to be applicable where the employee's means of knowledge of the danger to be incurred is equal to that of the employer. Such is the case where the instrument or tool, the defect in which is the cause of the injury is of so simple a character that a person accustomed to its use cannot fail to appreciate the risks incident thereto."

The evidence here by the plaintiff is that he had used the wrench for weeks and weeks, not constantly, but at dif- [fol. 48] ferent intervals, when he changed those oil screens and that he was perfectly familiar with it and its defects.

In the same note the following instrumentalities, among others, are referred to as having been held to be simple tools: a fork used in a dye-house. That is a fork to stir up the garments. A hook with a short handle used in moving timber in a saw mill. I happen to know what is referred to, an ordinary cant-hook used to roll a log over, made of a hook of iron and a wooden shank or shaft.

In Labatt's Master and Servant, 2nd Edition, Section 924 (a), in discussing the simple tool rule, it is said:

"In some cases the courts have gone to the length of stating that the rule requiring the master to use ordinary care to furnish reasonably safe appliances does not apply where the injury was caused by a simple tool."

I again stress that the duty is not on the defendant in this case or in any case of like character to guarantee that the tools furnished are free from defects. Only reasonable care and diligence is required to ascertain whether the tools are reasonably safe.

In support of that statement I might cite the case of Smith v. Green Fuel Economizer Co., 123 App. Div. 672, where a fatal accident resulted from the use of a certain ladder alleged to have been defective, which tipped sidewise, and the user fell and was injured. The Court, in holding the complaint should have been dismissed, said:

"Moreover, the deceased had been in the habit of using the ladder and was as competent as anyone else to say it was safe."

Here the plaintiff had been in the habit of using the wrench and knew more about it than his superiors according [fol. 49] ing to his own testimony. None knew anything about the wrench except the superintendent who said he would order another.

Taken in the strongest view, the defendant did all that was necessary; when the plaintiff told him the wrench was defective, he had a new one ordered immediately. The injury occurred before the new wrench was supplied. If the defendant had failed to furnish a new wrench within a reasonable time that would present a different question. The defendant was entitled to reasonable time in which to supply a new wrench.

"The rule of employer's liability applicable to complicated and dangerous machinery does not apply to simple things like ladders."

What could be more simple than this wrench? You all saw what sort of a tool it was. It was just like the one plaintiff hurt himself with. This was not worn, and the old one was—that is the only difference.

The plaintiff sues in this case under the Jones Act, which adopts the Federal Employers' Liability Act to seamen's actions. The simple tool and appliance doctrine was applied to a railroad worker in the case of Spain v. Powell, 90 F. (2d) in the Fourth Circuit. There the plaintiff alleged that his employer was negligent in failing to furnish him with proper appliances for his work. The injury resulted from a chain giving way, causing a part for a railroad car to fall on the plaintiff's hand. The Court, after quoting from the Newbern case, said, with respect to the relation of the simple tool doctrine to the question of assumption of risk:

"This is true, not because the employee assumes the risk of injury from defects in such tools, but because the possi-

[fol. 50] bility of injury is so remote as not to impose upon the master the duty of seeing that they are free from defects in the first instance or of inspecting them thereafter. The fact that the employee has better opportunity than the master to judge of the defects of such tools, that no inspection is necessary to discover such defects, and that no danger is to be apprehended which the employee cannot guard himself against, renders it unnecessary in ordinary cases that the master exercise with respect to simple tools the care that the law requires with respect to more complicated machinery. With respect to simple tools, ordinarily the master is not relieved of responsibility because the servant assumes the risk, but the servant assumes the risk, because the master is relieved of responsibility, or, what is probably a more accurate statement, the same circumstances which establish assumption of risk on the part of the servant show that there is no duty on the part of the master. Assumption of risk by the servant does not necessarily imply negligence on the part of the master."

In the case of Kilday v. Jahncke Dry Dock & Ship Repair Co., Inc., 281 Fed. 133, in the Fifth Circuit, the plaintiff was injured when a piece of the cutting edge of a chisel which he was using broke off and struck him in the eye. The negligence charged was failure to test the chisel. A chisel and a wrench—who can distinguish between the simplicity of the two tools? There is no distinction as to simplicity. The negligence charged was failure to test the chisel by the master to see whether it was a good chisel, free from defect. In affirming a decree sustaining an exception to the libel, the Circuit Court said:

"The general rule that it is the duty of the master to supply the servant with safe tools and appliances is sub-[fol. 51] ject to a well established exception in case of common and simple tools and appliances. Upon the theory and for the reason that the servant has a good opportunity for ascertaining the defects in simple tools, such as a chisel, as the master has, the law relieves the master of the duty which it imposes upon him where he furnishes complicated tools or machinery for the use of his servant."

In Middleton v. National Box Co., 38 F. (2d) 89, a comparatively recent case, the plaintiff was injured when a chisel, fashioned from an old file, broke. A chisel was

made from an old file and it broke. Commenting that the case was controlled by the general law of negligence, as to which the Federal and Mississippi decisions are in harmony, the Court said:

"They hold that in the case of simple tools the master, as a matter of law, is relieved of the ordinary duty of furnishing safe tools and appliances to the servant, and of inspecting and repairing the same furnished.

"* * * In fact, as a matter of law, the employee's knowledge of simple tools is presumed to be equal to that of the master."

Now, ladies and gentlemen, it is with considerable reluctance that I grant the defendant's motion for a judgment as of non-suit in this case. The reluctance is not born of the thought that I would do something wrong if I granted the motion or something wrong if I did not. The reluctance I find troubling me is due to the fact of the practical set-up or situation of this case. There is not very much involved in it at most, and it will be a great burden on this plaintiff to take this case to the Circuit Court, particularly on plaintiff's counsel, and on account of the [fol. 52] fact that there is not much involved, even if there is a final victory for the plaintiff, I dislike to place that burden on him. If I had my preference I would place the burden of review on the City of New York on the theory that it is amply able to take the case to the Circuit Court if it desired to or to the United States Supreme Court if it desired to. But I cannot be controlled by that consideration. I have to decide what I think is the law of this case based on the facts. If I did otherwise I would be in the same position if you got the case and determined it on account of sympathy or returned a verdict for the City because you live here.

We are not supposed to try cases on any such theory. A case is not properly tried unless fairly tried by all connected with it whose duty it is to see that it is fairly tried, the attorneys for the respective parties, the Judge and the jury.

I do not take any pride in my opinion. It is immaterial to me whether the Circuit Court affirms or reverses. I have no reason in the world to prompt me to grant the defendant's motion except that I think the plaintiff has failed to make out a case. If I followed my personal pref-

erences I would deny the motion and let the jury say whether the plaintiff was injured through the negligence of the defendant. But I cannot do that.

I was impressed by counsel's argument this morning. It was a good argument and plausible and persuasive, but after hearing it with an unbiased mind, I am satisfied that the plaintiff failed to make out a case against the defendant, prima facie, of negligence, and having failed in that it is the duty of the Court to hue to the line and let the chips fall where they may.

For the reasons stated, and in accordance with the law as I understand it, I am of the opinion that my judgment of non-suit should stand. To all of which the plaintiff has an exception.

[fol. 53] IN THE UNITED STATES DISTRICT COURT

STIPULATION AS TO CASE AND EXCEPTIONS—Nov. 30, 1940

It is hereby stipulated and agreed that the foregoing case and exceptions is hereby settled and allowed and the same may be signed and ordered on file and made part of the record on appeal in this cause.

Dated, New York, November 30, 1940.

Silas B. Axtell, Attorney for Plaintiff. William C. Chanler, Corporation Counsel, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER AS TO CASE AND EXCEPTIONS

The foregoing case and exceptions embodied herein from page 12 to page 52, inclusive, is hereby settled and allowed and ordered on file and may be entered and made a part of the record on appeal in this cause.

Isaac M. Meekins, U. S. D. J.

[fol. 54] IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

SIR:

Please take notice that the plaintiff, William Jacob hereby appeals to the United States Circuit Court of Appeals for

the Second Circuit from the judgment entered herein on April 5, 1940, dismissing the complaint on the merits and awarding costs in favor of the defendant and against the plaintiff.

Yours, etc., Silas B. Axtell, Attorney for Plaintiff, Office & P. O. Address, 15 Moore Street, New York City.

To: William C. Chanler, Esq., Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, New York City.

[fol. 55] In the United States District Court

Stipulation As to Exhibits—Nov. 30, 1940

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that none of the exhibits need be printed or placed in the record on appeal, but may be handed up to the Appellate Court at the argument of the appeal, by either party, with the same force and effect as though the same had been fully printed and placed in the record.

Dated, New York, November 30, 1940.

Silas B. Axtell, Attorney for Plaintiff. William C. Chanler, Corporation Counsel, Attorney for Defendant.

[fol. 56] In the United States District Court

Stipulation Settling Record—Nov. 30, 1940

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled action.

Dated, New York, November 30, 1940.

Silas B. Axtell, Attorney for Plaintiff. William C. Chanler, Corporation Counsel, Attorney for Defendant.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

OPINION—May 5, 1941

Appeal from the District Court of the United States for the Southern District of New York

This is an action under the Jones Act, 46 U. S. C. A. § 688, brought by a seaman to recover damages for personal injuries, with an additional count for maintenance and cure. The complaint was dismissed on the merits at the close of the plaintiff's case. From the resulting judgment for the defendant, he has appealed. Reversed in part.

Before L. Hand, Swan and Augustus N. Hand, *Circuit Judges*

[fol. 59] Silas B. Axtell, Attorney for appellant; Dominick Blasi, of counsel.

William C. Chanler, Corporation Counsel, Attorney for appellee: Paxton Blair, Alfred T. White and Leon Shaw, of counsel.

Per Curiam:

The first cause of action was dismissed on the defendant's motion at the close of the plaintiffs' case upon the ground that he had failed to prove facts sufficient to justify submitting to the jury the issue of the defendant's negligence. The plaintiff's story of the accident was briefly as follows: For many years he had been in the employ of the city as a water tender on its ferryboats. While working in the boiler room of the "Dongan Hills" on October 4, 1938 he was using an ordinary S shaped open end wrench to tighten a nut on the manifold head; as he put strain upon it the wrench slipped, causing him to lose his balance and fall from a platform, eighteen inches square, upon which he was obliged to stand to do the work. He ascribed the slipping of the wrench to the fact that its jaws had become worn by use so that it did not fit the nut perfectly but had a play of about one-sixteenth of an inch. He had used the same wrench on previous occasions. Two days before the

accident he had complained to the chief engineer about it and asked for a new one. The chief told him to look in the tool closet, and, when he found none there which would fit the stud, the chief sent out an order for a new one; but it had not arrived on the date of the accident. The plaintiff admitted, however, that there were monkey wrenches on board the ferryboat and that he could have used a monkey wrench for the work in hand.

[fol. 60] Having elected to sue under the Jones Act, 46 U. S. C. A. §688, the plaintiff was obliged to establish that his injuries were caused by the defendant's negligence. *Kumschman* v. *United States*, 54 F. 2d 987, 989 (C. C. A. 2). In taking the first cause of action from the jury the trial judge relied on what is sometimes called the "simple tool doctrine". See *Newbern* v. *Great Atlantic & Pac. Tea Co.*, 68 F. 2d 523 (C. C. A. 4). This so-called doctrine is but a short hand method of saying that the employer's duty to use reasonable care for the safety of his workmen does not require him to test or inspect ordinary simple tools from the use of which no danger is reasonably to be expected and as to which the employee is in a better position than the master to discover defects resulting from wear and tear and to protect himself against the risk of using the tool, if defective. In other words, the probability of any danger against which the employee cannot reasonably be expected to guard himself is so remote as to relieve the master of the duty of inspecting such simple tools or of warning his employee against the use of them if they show signs of wear. *McMillan* v. *Mineto Shade Cloth Co.*, 134 App. Div. 28, 31; *Miller* v. *Erie R. R. Co.*, 21 App. Div. 45, 47. The master's freedom from liability is not because the employee has been negligent or has knowingly assumed the risk—both contributory negligence and assumption of risk being excluded as defenses under the Jones Act—but because the master has been guilty of no negligence with respect to the tool used by the employee. *Newbern* v. *Great Atlantic & Pac. Tea Co.*, 68 F. 2d 523 (C. C. A. 4); *Middleton* v. *National Box Co.*, 38 F. 2d 89, 91 (S. D. Miss.); *Allen Gravel Co.* v. *Yarbrough*, 133 Miss. 652; 98 So. 117; *Hedlicke* v. *Highland Springs Co.*, 185 Minn. 79, 239 N. W. 896; see 91 A. L. R. 786. In the case at bar, the plaintiff was at liberty to select such tools as he thought suitable for the work in hand; he was not acting under orders in [fol. 61] using the worn wrench; if the wrench was in such

condition that he thought its use dangerous, he was under no necessity of using it, for a monkey wrench, admittedly suitable, was at hand. Under these circumstances the master had no reason to suppose that the plaintiff would use a wrench so worn as to create a situation of danger. Consequently we think the trial judge was right in not leaving to the jury the issue of negligence. The first cause of action was properly dismissed.

On the second cause of action, maintenance and cure, the defendant offered to consent to a judgment for loss of wages from the date of the accident until the plaintiff's return to work on November 10, 1938. No other damages were proven under this count, as the plaintiff had received free hospitalization. His counsel, however, refused "to accept any such judgment", and thereupon the second count was likewise ordered dismissed. In so doing we think the court erred. Counsel's irritable refusal to take any judgment if the first count were withdrawn from the jury does not justify penalizing his client by forfeiting an admitted liability for maintenance. An attorney cannot, without special authority from his client, release a cause of action except on full payment or otherwise surrender his rights. *Glover* v. *Bradley*, 233 F. 721, 726 (C. C. A. 4); *McFarland* v. *Curtin*, 233 F. 728, 730 (C. C. A. 4); *Martin* v. *Lehigh Valley R. R.*, 114 N. J. L. 243, 176 A. 665, 667; *Hahn* v. *Loker*, 229 Mass. 363, 118 N. E. 661, L. R. A. 1918 D. 807. Nor is an unauthorized settlement binding on the client. *Schneider* v. *Abrams*, 228 App. Div. (N. Y.) 1; *Countryman* v. *Breen*, 241 App. Div. 392, 394. From this we think it follows that the refusal here to accept a judgment to which the client was entitled should be given no effect. Although this point has not been urged upon appeal, the court will take it *sua sponte* in favor of a seaman who is often treated as in a sense a ward of the admiralty [fols. 62-70] court. Judgment should have been directed for the amount admitted to be due from the defendant, namely $214.37.

Accordingly dismissal of the first count is affirmed but dismissal of the second count is reversed with directions to enter judgment thereon in favor of the plaintiff in the sum admitted to be due.

Petition for rehearing covering 8 pages filed May 19, 1941, omitted from this print. It was denied, and nothing more by order of May 21, 1941.

[fol. 71] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—May 21, 1941

Before L. Hand, Swan and Augustus N. Hand, Circuit Judges

Silas B. Axtel for the appellant.

Per CURIAM:

Petition for rehearing denied.

L. H., T. W. S., A. N. H., C. JJ.

[fol. 72] IN UNITED CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed May 21, 1941

A petition for a rehearing having been filed herein by counsel for the appellant, upon consideration thereof, it is Ordered that said petition be and hereby is denied.

D. E. Roberts, Clerk.

[fol. 73] [File endorsement omitted.]

[fol. 74] IN UNITED STATES CIRCUIT COURT OF APPEALS

WILLIAM JACOB, Plaintiff-Appellant,

v.

THE CITY OF NEW YORK, Defendant-Appellee

JUDGMENT—Filed June 10, 1941

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the

Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court on the first count is affirmed, and judgment on the second count is reversed with costs and with directions to enter judgment thereon in favor of the plaintiff in the sum admitted to be due.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 75] [File endorsement omitted.]

[fol. 76] In United States Circuit Court of Appeals

[Title omitted]

Order Granting Motion to Recall and Amend Mandate—Filed July 21, 1941

A motion having been made herein by counsel for the appellee to recall and amend the mandate heretofore issued in the above entitled case, so as to provide that costs on appeal be awarded to the defendant-appellee as the prevailing party;

Upon consideration thereof it is Ordered that said motion be and hereby is granted.

D. E. Roberts, Clerk.

[fol. 77] [File endorsement omitted.]

[fol. 78] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 79] Supreme Court of the United States

Order Allowing Certiorari—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover. Enter Silas B. Axtell. Seamen's Case. File No. 45,917. U. S. Circuit Court of Appeals, Second Circuit. Term No. 589. William Jacob, Petitioner, vs. The City of New York. Petition for a writ of certiorari and exhibit thereto. Filed September 6, 1941. Term No. 589, O. T. 1941.

(7828)